publication that was the basis of the information was contemptuous, whether it was privileged, whether the information was sufficient, whether there was proof of publication, and similar questions.

Respondent questioned the authority of the judge to act as such. Petitioner, thereupon argued that the question was moot, because he had been designated to hold the District Court. (Record, pp. 853, 854, 868, 871.)

The judge then decided that the publication was not contemptuous, and therefore that the District Court in committing petitioner had acted in excess of its power. (Record, pp. 24, *et seq.*) An order discharging him from respondent's custody was made accordingly. From this order respondent appealed to the Circuit Court of Appeals, which reversed the order. This determination is now sought to be reviewed herein.

While that appeal was pending, and after a motion to dismiss it had been denied, the petitioner filed in this court a petition for a writ of certiorari or, in the alternative, for a writ of mandamus, in an attempt by a "short cut" to prevent the Circuit Court of Appeals from hearing the appeal on the merits. This petition was denied March 6, 1922.

ARGUMENT.

POINT I.

There was no issue of jurisdiction raised in the habeas corpus proceeding.

The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of habeas corpus cannot be employed to retry the issues, whether of law, constitutional or other, or of fact.

Glasgow v. *Noyer*, 225 U. S. 420, 429.
Matter of Gregory, 219 U. S. 210, 213, 218.
Ex parte Watkins, 3 Peters 192.
Ex parte Parks, 93 U. S. 18.
Ex parte Yarbrough, 110 U. S. 651, 654.
Matter of Spencer, 228 U. S. 652.
Ex parte Kearney, 7 Wheat. 38.

Under these authorities the court had no authority to review questions of law by habeas corpus. The proper remedy is writ of error or appeal to a competent appellate court.

The court that committed the petitioner for contempt had jurisdiction of the subject matter of the contempt inherently and under section 268 of the Judicial Code.

It had jurisdiction of the petitioner's person because he came before it for trial and the method of getting him there is immaterial. (*Ker* v. *Illinois*, 119 U. S. 436.) In fact he was brought into court regularly and in accordance with settled procedure. The sentence imposed was within the District Court's power, since section 268 authorizes punish-

ment "by fine or imprisonment, at the discretion of the court."

Thus complete jurisdiction is shown. The questions which were presented as jurisdictional on the application for habeas corpus were mainly whether the publication was contemptuous, whether it was privileged, whether the information was sufficient, and whether there was proof of publication. These questions were obviously not jurisdictional but involved the merits of the case. Upon the first of these the order discharging the petitioner from the commitment was based.

These are all questions of law, that should be reviewed by an appellate court on writ of error or appeal. This orderly procedure was avoided. Petitioner instead sought and obtained by habeas corpus a review by a single judge of the Circuit Court of Appeals, *who had been designated to hold the District Court*. Having secured a favorable result, he then contended that the judge had acted as a circuit judge, and that his determination was not appealable to or reviewable by any court. The subject of appealability will be argued later. It is now strongly urged that the point herein presented is so well settled as to require no restatement in this case of the principles applicable to habeas corpus.

The exceptions to the rule, which require the courts on *habeas corpus* to go beyond the strict scope of the writ and consider other than jurisdictional questions are equally well settled. They will now be discussed.

POINT II.

The exceptions to the general rule as to the scope of habeas corpus do not include the case at bar.

These exceptions may be classified as follows:

1. Where there is a conflict of jurisdiction between a State and the United States.

2. Where the authority and operations of the Federal Government are or may be interfered with by State action.

3. Where rights or obligations of the United States under a treaty are involved.

4. Where the petitioner is held under State process based upon a State law which is in violation of the Constitution of the United States.

5. Where the judgment or order under which he is held is a nullity because in excess of the power of the court.

The first and second exceptions are closely related. The fundamental reason for the first four is the necessity of maintaining the supremacy of Federal laws and treaties in compliance with section 2 of Article VI of the Constitution. (*Tarble's case*, 13 Wall. 397, 406–407, 410–411; *Tennessee* v. *Davis*, 100 U. S. 257, 262; *Cunningham* v. *Nagle*, 135 U. S. 1, 73; *In re Watts*, 190 U. S. 1, 27.)

The fifth exception is of present interest, because petitioner apparently has sought to bring himself within it. *Ex parte Hudgings* (249 U. S. 378) is the most recent illustration of it. The facts there were peculiar and the case stands alone. The district

judge, presiding at a trial, formed the opinion that a witness, then testifying, was committing perjury by asserting and reiterating that he could not recall having seen certain persons write, although he had frequently associated with them. Thereupon, without any charge being preferred, without any proof of guilt being offered, without any evidence, without any hearing or any kind of legal proceeding, the court ordered the imprisonment of the witness for contempt by the commission of perjury, for an indefinite term and until he should purge himself of contempt by testifying to what the court conceived to be the truth, the reverse of his previous testimony. Under these extraordinary circumstances, which showed a clear want of jurisdiction, this court on habeas corpus freed the prisoner, using in its opinion guarded language manifestly limited strictly to the peculiar facts of the case. It was expressly stated that the case was exceptional.

The case at bar is entirely free from the arbitrary action commented upon by this court in the Hudgings case. In this case the proceedings to determine and punish the contempt were of a most thorough and deliberate nature. *The offense occurred on October 6th, 1919. The judgment of conviction and commitment were entered February 24th, 1921.* The intervening time was occupied with long arguments, both oral and written, on objections to the jurisdiction, a demurrer, a motion to quash, and finally with a trial of great length. The trial court had made the fullest and most patient

inquiry into all the facts before passing judgment and sentence.

The exceptional types of cases are classified in *Henry* v. *Henkel* (235 U. S. 228–229), wherein this court repeats a warning often previously stated and still disregarded by petitioners for habeas corpus:

> But in all these instances, and notwithstanding the variety of forms in which the question has been presented, the court, with the exceptions named, has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error, nor is it intended as a substitute for the functions of the trial court.

POINT III.

The order reversed by the Court of Appeals was appealable to that court.

This point turns in the first place upon the question whether the order discharging petitioner was a court order or a judge's order.

If it were a judge's order, there would be a conflict as to the appealability of it. The Court of Appeals for the Eighth Circuit in *Webb* v. *York* (74 Fed. 753) in a well-reasoned opinion affirmed the appealability of such an order, but the Court of Appeals for the Fourth Circuit in *Hoskins* v. *Funk* (239 Fed. 278) denied it.

In the instant case the Court of Appeals found it unnecessary by reason of the facts to deal with the question. The order was made by a judge of the Court of Appeals, who had been designated to

hold the District Court. When his authority to act as a judge was challenged by respondent, as already stated, petitioner fell back upon the designation, and treated the question of his power as a judge as entirely moot. Proof of the designation was then made. And the judge in his opinion referred to the order designating him. Under these circumstances, the Court of Appeals very naturally decided the order was a court order made by him under the designation.

It refused to allow the petitioner to rely upon the designation as conferring jurisdiction to entertain the habeas corpus proceeding, and then to deny its effect for the purpose of defeating the appeal. In announcing this opinion the court stated that if the order were not a court order it would be a nullity because a judge of the Court of Appeals as such had no authority to issue a writ of habeas corpus. It is only in this sense that this case involves the question of the right of a judge of the Circuit Court of Appeals to issue the writ. If this court should be disposed to grant the petition upon the ground that this is an important question, it is respectfully submitted that the question does not arise in a form to be reviewed.

The court's conclusion is well supported by the plain meaning of the Statutes. These points, presented in skeleton form, without development, will indicate the basis for the conclusion:

1. A circuit judge has no authority except that conferred by statute. (*Whitney* v. *Dick*, 202 U. S. 132, 135–137.)

2. *Sections 117* and *118* of the *Judicial Code* define his authority. Neither section gives him power to grant or issue a writ of habeas corpus.

3. *Section 751* of the *Revised Statutes* authorizes the *Supreme Court*, the *Circuit Court* and the *District Court* to *issue* writs of habeas corpus. *Section 752* authorizes the *judges of the said courts* to *grant* writs of habeas corpus.

The latter section clearly does not refer to a judge of the Circuit Court of Appeals. He is not and never was a judge of the Circuit Court. And the powers of that court were never given to a judge of the Circuit Court of Appeals. Prior to the abolition of the Circuit Courts, *section 752* embraced all judges of the United States, but it does not now.

4. When the Circuit Court was abolished by the *act of March 4th, 1911* (36 Stat. 1167), its powers were transferred to the District Court. That part of the act making the transfer is *section 291* of the Judicial Code.

5. *The act of April 10th, 1869* (16 Stat. 44) conferring on the circuit judge for his circuit, "the same power and jurisdiction as the Justice of the Supreme Court allotted to the circuit," does not apply to a judge of the Circuit Court of Appeals. The act was continued in identical language by *section 607* of the Revised Statutes down to the adoption of the Judicial Code. That part of the *act of March 4, 1911*, which is now *section 297* of the Judicial Code, in explicit terms repealed *section 607* and all statutes

issued herein," and among other things, certified therein:

> "VIII. . . . *This respondent's custody of the petitioner complained of in the petition* was by virtue of and in obedience to, and the true cause of the detention of the petitioner was, a commitment duly and regularly issued out of the said Court requiring this respondent to take the petitioner into custody for the purpose of imprisoning him in the said Essex County Jail in execution of said sentence, a copy of which is hereto annexed as Exhibit II. . ."
>
> "X. This respondent has produced before your Honor the body of the petitioner *as commanded by the writ of habeas corpus herein*, and prays that the said writ be dismissed and that the petitioner be remanded to this respondent's custody to be dealt with in accordance with the said commitment." (Record, pages 846-847, fols. 2537-2540).

The objections to the writ are hypercritical in the extreme, and should be disregarded by this Court as they were eventually, by all the judges of the Court below.

> (See Especially Record, page 1142, fol. 3426; page 1162, fols. 3478-3479, and page 1176, fols. 3520-3521.)

It was proper for the tribunal before which the *habeas corpus* proceeding was properly pending to "elect to waive the issuance of the writ and consider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be discharged."

Ex parte Milligan, 4 Wall. 2, 110.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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In the Supreme Court of the United States.

CHARLES L. CRAIG, PETITIONER,
v.
WILLIAM C. HECHT, UNITED STATES Marshal for the Southern District of New York, respondent.
No. 488.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

STATEMENT.

The petitioner was tried upon an information, alleging contempt of the United States District Court for the Southern District of New York, found guilty, and committed by that court. *No writ of error from the judgment of conviction was ever applied for.* The petitioner instead within a few hours after his commitment obtained a writ of habeas corpus from a judge of the Circuit Court of Appeals for the Second Circuit, who at the time was designated to hold the District Court. In the habeas corpus proceeding thus initiated the petitioner raised the questions, whether the

enacted prior to February 1st, 1911, which authorized the appointment of circuit judges.

6. Except when he holds the District Court by assignment or sits under a special statute like the *expedition act of February 11th, 1903* (32 Stat. 803), the only functions of a circuit judge to-day are as a member of the Court of Appeals and distinctly appellate.

Whitney v. *Dick*, 202 U. S. 132.
McLish v. *Roff*, 141 U. S. at page 666.
Lau Ow Bew v. *United States*, 144 U. S. 55–6.

The term "circuit judge" as used to-day has been adopted as the most convenient designation for a judge of the Court of Appeals. It is not used in the sense of the old statutes enacted prior to the abolition of the Circuit Court. Petitioner has used the term in that sense, and has treated it as if it meant "judge of the Circuit Court." Manifestly, the judge of the Circuit Court of Appeals, who discharged petitioner, was not a member of a court which had long been abolished.

There being ample other provision for judicial inquiry into restraints of liberty, there is no occasion to stretch *section 752* so as to spell out authority for the present circuit judges to grant writs of habeas corpus. Such a strained construction is not necessary in order to prevent a failure of the constitutional guaranty against suspension.

Whitney v. *Dick*, 202 U. S. 132, 135.
Matter of Tracy, 249 U. S. 551.

The Circuit Court of Appeals finding that there was no basis whatever for a claim of such authority by one of its members concluded, from the insistence throughout the habeas corpus proceeding on the designation of the circuit judge to hold the District Court, that his order was intended to be and in fact was a court order. The conclusion is irresistible. It takes from the view of this court the question whether a present circuit judge has power to grant habeas corpus. Besides, the conclusion reached on that question is so obviously correct as to require no statement of the law by this court.

In passing, it may be observed that the circuit judge did not become a district judge by the designation. He was assigned to hold the District Court. And any order he made thereunder was a court order.

Finally since the order was a court order there is no question of its appealability.

POINT IV.

The paper called the writ of habeas corpus was not in fact such.

A writ of habeas corpus is process. As such it should issue out of the court under its seal and should bear the *teste* of the clerk of the court in the name of the Chief Justice or the senior District Judge. (*In re Kaine*, 14 Howard, 103, 119.)

The "writ" in question had none of these essentials of process. It was therefore void and any order based on it is void. (*In re Kaine, supra.*)

CONCLUSION.

The petition should be denied.

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DAVID V. CAHILL,
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SEPTEMBER, 1922.

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